Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine,
Petitioners

vs.

WILLIAM R. COOMBS; BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, Borough Manager of Tionesta, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA); MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA;
Respondents

On Petition for a Writ of Certiorari
To the Third Circuit Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Janice Haagensen
Counsel of Record
349 New Road
Enon Valley, PA 161120
Tel: (724) 336-5962
Attorney for Petitioners,
Robert W. Grine II, Joanne D. Grine, Estate of Margaret M. Grine

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QUESTION PRESENTED

I. Whether the Third Circuit Court of Appeals infringed upon Petitioners' fundamental rights to due process and rights of access to the courts when it summarily granted the United States' Rule 27 Motion to dismiss the Petitioners' appeal as of right from a final order certified pursuant to Rule 54(b), on grounds that the appellate court lacked jurisdiction over the subject matter of the appeal?

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IN THE
SUPREME COURT of the UNITED STATES

Robert W. Grine II, JoAnne D. Grine, and the
Estate of Margaret M. Grine,
Petitioners

vs.

The Estate of William R. Coombs, et al,
Respondents

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Third Circuit

Petitioners, Robert W. Grine II, JoAnne D. Grine, and the Estate of Margaret M. Grine, respectfully pray that a writ for certiorari issue to review the order of the United States Court of Appeal for the Third Circuit entered in this proceeding on February 27, 2002.

OPINIONS BELOW

The summary decision of the Third Circuit Court of Appeals which granted the United States' Rule 27 Motion to dismiss the Petitioners' Appeal as docketed at No. 01-4118 and as taken from the district court order certified in accordance with Rule 54(b) of the Federal Rules of Procedure and entered on September 19, 2001, was filed on February 27, 2002; it appears at Appendix A (App. A) and it is unreported.

The appellate order summarily denying the Petitioners' timely-filed Petition for Rehearing was entered on April 23, 2002, it appears at Appendix B (App. B), and is unreported.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The summary decision of the United States Court of Appeals granting the United States' Rule 27 Motion for Dismissal of the appeal at No. 01-4118 was entered on February 27, 2002. The Court of Appeals denied Petitioners' timely-filed Petition for Rehearing on April 23, 2002.

The question presented did not arise until Petitioners received the appellate court's order of February 27, 2002 granting the United States' Rule 27 Motion to dismiss the appeal docketed at No. 01-418 by the Court of Appeals on November 14, 2001. Petitioners thereupon sought rehearing arguing that the Court of Appeals had erred in prohibiting a timely appeal as of right from a final order and that its decision resulted in fundamental unfairness and a violation of the due process clause of the federal constitution.

The jurisdiction of the United States District Court for the Western District of Pennsylvania was invoked pursuant to 28 U.S.C. §1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case concerns the Fifth Amendment to the United States Constitution which provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

This case also concerns Section 1291 of Title 28, U.S.C., which provides that "the courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States ..."

STATEMENT OF THE CASE

Petitioners' initial complaint was filed on December 21, 1995; their Amended Complaint was filed on April 2, 1996. Petitioners are Robert W. Grine, II, Joanne D. Grine, and the Estate of Margaret M. Grine; Defendants were William R. Coombs; Billie M. Yost; Jack Shrum, et. ux.; Essex Environmental Industries, Inc.; Rotocast Plastic Products, Inc.; Tionesta Borough Council, Ronald hall, President of Borough Council, in an individual and official capacity; Scott Daum, Borough Manager of Tionesta, in an individual and official capacity; Commonwealth of Pennsylvania, Department of Environmental Protection; Daniel Holler, Emergency Response Coordinator, Northwest Region, in an individual and official capacity; Gary Wozniak, in an individual and official capacity; United States of America Environmental Protection and Michael McCabe, Regional Administrator, Region III, U.S. EPA.

Petitioners brought suit under the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et. seq., the Federal Water Pollution Control Act ("Clean Water Act"), 33 U.S.C. §1251 et. seq., and the Comprehensive Environmental Response, Compensation, and Liabilities Act of 1980 ("CERCLA"), 42 U.S. C. §9601 et. seq., as amended by the Superfund Amendments and Reauthorization act of 1986. Petitioners also brought suit against the US EPA and its Region III Director under the Freedom of Information Act, 5 U.S.C. §552. The Amended Complaint also assets causes of action under the state common-law theories of intentional infliction of emotional distress, trespass, nuisance and strict liability, as well as a claim pursuant to the Pennsylvania Hazardous Sites Cleanup Act ("PHSCA"), 35 Pa. Stat. Tit. 35, §6020.101 et seq.

Petitioners were the victims of rogue or midnight dumping of acutely hazardous toxic substances transported in federally-licensed overpack drums abandoned in close proximity to their home and private water supply. After they sued individual owners of the site, transporters, corporate entities who generated the waste, and government agencies which had failed to investigate the nature and extent of the contamination, Petitioners became the targets of a grand jury convened to investigate the commission of an environmental crime, and were surveilled by federal agents.

All Defendants, including the U.S. EPA in the person of its agents on the site, are in violation of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq., and disposed of or caused other to dispose of waste materials on the Coombs site; the material so disposed of was defined by law to be a hazardous waste. The federal Defendants knew that the wastes had the potential to be harmful to others or to the environment; Defendants knew that the wastes site did not have a permit or interim status authorizing treatment, storage or disposal of hazardous wastes. The U.S. EPA possessed the authority to abate illegal activity on the Coombs site, and failed to end such activities.

All Defendants, and others as yet unknown to Plaintiffs, knowingly conspired and agreed together to dispose of hazardous wastes without a permit, in violation of RCRA. All Defendants knowingly disposed of and caused, counseled, commanded, induced and procured the knowing disposal of hazardous wastes as defined in 40 CFR 261.10 et seq.

Plaintiffs sued all Defendants as owner or operators of an unpermitted facility, as that term is defined in §101(9) of the

Comprehensive Environmental Response and Liability Act of 1980, 42 U.S.C.A. §9601 et seq., as amended by both the Superfund Amendments and Reauthorization Act of 1986, and as arrangers for the disposal of hazardous substances.

Plaintiffs sued Defendants U.S. EPA under the Freedom of Information Act, as amended, (5 U.S.C. §552(a)(4)(h), and sought injunctive relief against the United States. Plaintiffs also asked for attorneys' fees and costs.

Plaintiffs requested consequential and punitive, special and incidental damages, plus attorneys' fees and costs, from all Defendants, and also requested injunctive and declaratory relief. Plaintiffs requested that court fines be assessed against all Defendants; Plaintiffs asked that they be awarded any and such other legal and equitable relief as the court deemed proper.

On August 13, 1996, the U.S. EPA motioned for summary judgement on Plaintiffs FOIA claims. On August 19, 1996, the U.S. EPA filed a motion to dismiss certain claims in the Plaintiffs' Amended Complaint. They also filed a brief in opposition to Plaintiffs' Motion for Writ of Mandamus. U.S. EPA's Motion for Summary Judgement was granted in part, but with respect to certain claims the motion was taken under advisement by the district court.

On December 27, 1996, the district court granted the United States' Motion to Dismiss the Amended Complaint and the Petition for Writ of Mandamus. On December 18, 1997, Petitioners motioned for an order adjudging the U.S. EPA and the PA DEP in civil contempt. Petitioners filed a motion for reconsideration of the order of December 27, 1996, and the order of February 9, 1998, on March 10, 1998. The

district court issued an order limiting the scope of a contempt hearing in relation to the U.S. EPA on August 25, 1998.

Petitioners' Motion for Reconsideration of the district court's order of December 27, 1996 was denied by the district court on February 27, 2001.

Plaintiffs' Motion for Reconsideration of the order of August 25, 1998, was filed on February 26, 2001 and denied by the district court on May 2, 2001.

At the conclusion of the hearing of September 19, 2001, the district court judge granted the federal motion for Rule 54(b) certification of the order granting the United States Motion to dismiss the Amended Complaint. The district court directed the entry of a final "judgement" dismissing all claims against the U.S. EPA.

The district court judge then purported to stay "enforcement" of the order of dismissal until the end of the case, pursuant to Fed. R.C.P. Rule 62(h).

(On October 22, 2001, the order of September 19, 2001 was entered into the record by the district court.) On October 30, 2001, the Petitioners filed a notice of appeal from the final order of the United States District court for the Western District of Pennsylvania at No. 95-CV-342, as initially entered on December 27, 1996, and certified as a final order in accordance with Rule 54(b) on September 19, 2001.

REASONS FOR GRANTING THE WRIT

I. The decision of the Third Circuit Court of Appeals conflicts with this Court's precedents and with settled law in the Third Circuit.

The Court of Appeals has erred in ruling that it lacks subject-matter jurisdiction over an appeal as of right from a final order. The rule of finality is not subject to a judicially created exception at the district court level through the district court's improper reliance on Fed. R. Civ. Proc. Rule 62(h), in conjunction with a Rule 54(b) certificate of finality.

The district court has successfully eliminated plaintiffs' right to take an immediate appeal from an order certified in accordance with Rule 54(b) as a final order.

The court has also successfully insulated its order from review or reconsideration before an end-of-case judgement because its order has lost its interlocutory status, even though it is protected from review.

The district court has thus entered an order that cannot be challenged on any grounds whatsoever until judgement day.

Rule 54(b) certification of an order for immediate appeal makes such an order appealable as of right, and reliance on Rule 62(h) does not invalidate Rule 54(b) on this point. "The requirement in Rule 54(b) that the court make an express determination that there is no just reason for delaying the review of a judgement on fewer than all the claims ... eliminates any doubt whether an immediate appeal may be sought." Fed. Practice & Procedure, Wright, Miller

& Kane, Civil 2nd §2254, p. 38. (Emphasis supplied, footnote omitted.)

Rule 54(b) "provides an opportunity for litigants to obtain from the District Court a clear statement of what the court is intending with reference to finality ..." Dickensen v. Petroleum Conversion Corp., 70 S. Ct. 322, 324 (1950).

The Court of Appeals must accept jurisdiction over an appeal if it is satisfied that the district court's order is properly before it; 28 U.S.C.S. §1291.

Because the Rule 27 motion as framed by the federal appellees implicated the scope of the court's appellate jurisdiction, it was incumbent on the Court of Appeals to establish the propriety of the district court's certification of its own order for immediate appeal, pursuant to Rule 54(b). Since the appellate court never sought to review or disturb the certificate of finality, the district court's certified order can sustain an appeal.

The appellate court made no inquiry whatsoever of record to determine if certification was proper, and let the entry of certification pursuant to Rule 54(b) stand undisturbed as executed by the district court judge. Thus, the Court of Appeals did not restore the interlocutory character of the district court judge's adjudication. The scope of appellate jurisdiction was never delineated by the appellate court through meaningful review of the record (or through anything approaching meaningful review of the propriety of the certification.)

The Court of Appeals in the guise of dealing summarily with the Rule 27 motion submitted by the federal appellees did nothing to disturb the district court's Rule 54(b) certification.

The Court of Appeals thus let stand the district court's adjudication pursuant to Rule 54(b). Because the Court of Appeals' appellate jurisdiction is strictly a matter of statute, Congress's determination that Courts of Appeal should hear only final orders is conclusive. Bensalem v. Am. Fidelity Fire Ins. Co., 644 F.2d 990 (3rd Cir 1981). If the district court properly made its Rule 54 certification, the Court of Appeals must then exercise jurisdiction over the appeal. Del. Valley Citizens Council for Clean Air v. Davis, 932 F.2d 256 (3rd Cir. 1991). In this case, the Court of Appeals never considered the propriety of the rule 54(b) certification, even though certification implicated the scope of its jurisdiction.

As this Court unambiguously stated in Delaware Valley, if the district court properly certified its orders as final judgements for purposes of appeal, the Court must then exercise its jurisdiction over an appeal as of right.

Accordingly, the Court of Appeals has subject-matter jurisdiction over this interlocutory appeal by virtue of the district court's certification and by virtue of the effect of 28 U.S.C.A. §1291. "If the district court properly made that certification, we must then exercise jurisdiction over this appeal pursuant to 28 U.S.C.A. §1291 (West. Supp. 1990). See Curtiss-Wright Corp. v. General Electric Co., 446 U.S. 1, 8, 100 S. Ct. 1460, 1465, 64 L.Ed.2d 1 (1980); Culbreth v. Amosa (Pty) Ltd., 898 F.2d 13, 14 ((3rd Cir. per curiam))." Delaware Valley, at 263.

Rule 62 cannot be utilized to limit the scope of appellate jurisdiction as conferred on the Courts of Appeal by statute.

Rule 62(h), Stay of judgement as to Multiple Claims or Multiple Parties, states only that "when a court has ordered a final judgement under the conditions stated in Rule 54(b),

the court may stay enforcement of that order until the entering of a subsequent judgement or judgements and may prescribed such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgement is entered." Rule 62(h) can only be utilized to stay execution of a judgement made on the merits.
In Curtiss-Wright Corp. v. General Electric Company, 100 S. Ct. 1460 (1980), the order that was certified was the district court's granting of summary judgement on the merits of a nineteen-million dollar claim for balance due on specific contracts. Ftn. 3 in Curtiss-Wright means what it says: "We note that Federal Rule of Civil Procedure 62(h) allows a court certifying a judgement under Rule 54(b) to stay its enforcement until the entering of a subsequent judgement or judgements." (Emphasis supplied.) Rule 62(h) has never been used in Curtiss-Wright or any other case to stay an appeal as of right from a final order invoking statutory and constitutional grants of jurisdiction to an Article III court.

The district court judge who dismissed appellants' complaint for lack of jurisdiction over the subject-matter had no power to enter a subsequent judgement on the merits and no power to execute on a judgement. He could not "enforce" an order dismissing claims in the amended complaint for lack of jurisdiction.

"Without jurisdiction, the court cannot proceed at all in any course. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Ex parte McCardle, 7 Wall. 506, 514, 19 L.Ed 264 (1869), cited in Steel Co. v. Citizens for Better Envir., 140 L.Ed.2d 210, 227 (1998). And see: Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379, 382, 28 L.Ed 462 (1884).

The Court of Appeals has never concluded (certainly not through its summary disposition of a Rule 27 motion without explanation or opinion) that the district court orders as certified pursuant to Rule 54(b) are not final orders within the meaning of §1291, with regard to the claims to which they apply.

This is improper when the Court of Appeals is purporting to deal with a query as to the scope of its jurisdiction. The district court thus made its adjudication final when it executed its certificate in light of the appellate court's failure (or its refusal) to review the propriety of certification de novo.

The Court of Appeals never determined (other than summarily, and off the record) whether the district court's certification had the requisite aspects of finality. Such a review is mandatory in order to establish the scope of appellate jurisdiction. This is a deprivation of the appellants' rights of due process. The district court made its adjudications final when it executed its certificate. Petitioners have the same right to take an appeal as any other litigants in this system. No viable exception to the scope of appellate jurisdiction has been drafted by the district court, by the federal appellees, or by this Court.

Because appellants have been summarily denied their right to take an appeal from a final order, within the meaning of 28 U.S.C.A. §1291, they have been denied their due process right of meaningful access to the courts. The Court's summary dismissal of this appeal from a final order is constitutionally defective.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated: July 20, 2002

Respectfully,

Janice S. Haagensen
Counsel of Record
349 New Road
Enon Valley, PA 16120
Telephone: (724) 336-5962

APPENDIX

Appendix A	Summary Decision of Third Circuit Court of Appeals Granting the United States' Rule 27 Motion to Dismiss the Petitioners' Appeal for Lack of Subject-Matter Jurisdiction
Appendix B	Summary Decision of the Third Circuit Court of Appeals Denying the timely-filed Petition for Rehearing

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

January 25, 2002
D-43

Docket No. 01-4118

ROBERT W. GRINE, JOANNE D. GRINE
And MARGARET M. GRINE, Appellants
vs
WILLIAM R. COOMBS, ET AL.
(Western District Civil No. 95-cv-00342) (SJM)

Present: **NYGAARD, ROTH and BARRY Circuit Judges**

(1) Motion of Federal Appellees for Dismissal of Appeal for Lack of Appellate Jurisdiction;
(2) Appellants' Response to Appellees' Rule 27 Motion for Summary Dismissal of Appeal for Lack of Appellate Jurisdiction;
(3) Motion by Federal Appellees for Leave to File Reply to Response to Motion to Dismiss Out of Time;
(4) Reply of Federal Appellees to Response of Appellant to Motion to Dismiss Appeal for Lack of Appellate Jurisdiction, not filed unless the Court so directs.

Dana Moore Case Mgr.
(267) 299-4927

Copy of Clerk's 1/16/02 Order Sent for Court's Information.

ORDER

The foregoing motion to dismiss is granted. The motion to file the reply out of time is denied as moot.

Dated: Feb. 27, 2002

By the Court,

Circuit Judge

DMM/cc: Janice S. Haagensen, Esq.
Bonnie R. Schlueter, Esq.
Russell F. Smith, III, Esq.

APPENDIX A

THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-4418

ROBERT W. GRINE II; JOANNE D. GRINE;
ESTATE OF MARGARET M. GRINE,
Appellants

v.

BILLIE M. YOST; JACK W. SHRUM, ET UX; ROTOCAST PLASTIC PRODUCTS; ESSEX ENVIRONMENTAL INDUSTRIES, INC.; TIONESTA BOROUGH COUNCIL OF FORREST COUNTY; RONALD HALL, President of Borough Council, in an individual and official capacity; SCOTT DAUM, BOROUGH MANAGER OF TIONESTA, in an individual and official capacity; COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION ("DEP"); GARY WOZNIAK, in an individual and official capacity as an agent of the DEP; DANIEL HOLLER, Emergency Response Coordinator, Northwest Region, in an individual and official capacity, as an agent of the DEP; RONALD W. COOMBS, Executor of the Estate of WILLIAM R. COOMBS, DECEASED; MICHAEL MCCABE, Regional Administrator, Region III, U.S. EPA; UNITED STATES OF AMERICA ENVIRONMENTAL PROTECTION AGENCY (EPA);

On Appeal from the United States District Court for the Western District of Pennsylvania
(D.C. Civ. No. 95-cv-00342)

SUR PETITION FOR REHEARING

BEFORE: BECKER, Chief Judge.
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO and FUENTES, Circuit Judges

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APPENDIX B

The Petition for rehearing filed the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service, and no judge who concurred in the decisions having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

/s/
United States Circuit Judge

DATE: April 23, 2002
DMM/cc: Janice S. Haagensen, Esq.
Russell F. Smith, III, Esq.
Bonnie r. Schlueter, Esq.

Received and Filed
4-23-02 DM
Marcia M. Waldron, Clerk